

STATE OF MICHIGAN
IN THE SUPREME COURT

KEITH TODD,

Plaintiff-Appellant,

v

NBC UNIVERSAL (MSNBC),

Defendant-Appellee

and

EASTPOINTE POLICE DEPARTMENT,
and A-ONE LIMOUSINE

Defendants.

Supreme Court No. 153049

Court of Appeals No. 323235

Wayne County Circuit Court
Case No. 14-004589-CZ

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**APPELLANT KEITH TODD'S REPLY TO APPELLEE MSNBC'S OPPOSITION TO
HIS APPLICATION FOR LEAVE TO APPEAL**

ORAL ARGUMENT REQUESTED

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I. Defendant-Appellee should be excused for citing a court rule that no longer exists as its primary argument against Plaintiff-Appellant's petition

Defendant-Appellee MSNBC states in its opposition to Plaintiff-Appellant Keith Todd's petition that Mr. Todd "didn't even cite MCR 7.302(B)"¹ in support of its position that his petition to this Court should be denied. MSNBC should be forgiven for citing a court rule that was abrogated six months ago. Mr. Todd understands that mistakes happen.

However, MSNBC's behavior at the root of this case is serious and has caused significant damages to Mr. Todd, both past and present. Although Mr. Todd was prevented from engaging in any discovery and pursuing his damages, he is prepared to do so. He's a young man that was trying to get his life back on track after significant setbacks, suffering abuse at the hands of his parents, living in foster homes, and moving around to multiple states to find a stable family life. But he was finally starting to get bearings while living with his uncle and landing a job. MSNBC put an end to that with its *Dash Cam Diaries* television show. Between the airing of MSNBC's television episode and the current date, Mr. Todd has rotated through approximately 15 medications to address his depression and anxiety and is just now getting back on his feet.

The basic facts aren't in contention:

1. MSNBC aired a television show, multiple times, accusing Mr. Todd of serious criminal acts;
2. MSNBC displayed Mr. Todd's photo on that television show, while naming him multiple times and listing his age;
3. MSNBC did these things even though Mr. Todd had absolutely nothing to do with the situation being shown; and

¹ Defendant-Appellee's Reply Brief 1.

4. Mr. Todd suffered and continues to suffer significant damages as a result of MSNBC's actions.

MSNBC acknowledges its actions. There is no question that the episode in question was aired multiple times. Mr. Todd saw the episode. He was deeply affected by it and continues to be to this day. His case was truncated not based on the merits of his case, but on an error of law by the trial court. The Court of Appeals panel below erroneously upheld the trial court's decision—not based on the standards of Michigan law applicable to the situation—but on its own sophistic logic.

Mr. Todd asks this Court to correct the Court of Appeals panel as it relates to both the application of the elements of *relative position* and *context* inherent in the tort of intentional infliction of emotional distress and the trial court's profound error of law when it prevented Mr. Todd from amending his complaint. The trial court incorrectly determined that Mr. Todd's case was entirely barred by the statute of limitations, which the Court of Appeals panel below addressed and corrected. The bottom line therefore remains: Mr. Todd has valid and legitimate claims against MSNBC. He simply asks this Court to allow him to pursue those claims.

A. MSNBC's argument that Mr. Todd has "waived" an issue is not supported by the case law it cited

In its opposition to Mr. Todd's petition to this court, MSNBC continues its argument by claiming that the case law "clearly" shows that Mr. Todd has waived his argument in regards to *context* and *relative position* as a part of intentional infliction of emotional distress. Yet the cases cited by MSNBC do not support its position at all. Indeed, amongst the confusing citation errors, Mr. Todd is only able to discern from MSNBC's argument that it believes that Mr. Todd's entire claim for intentional infliction of emotion distress was somehow waived. Yet, if this were the

case, the Court of Appeals didn't notice. Mr. Todd properly raised the issue of the incorrect dismissal of his claim for intentional infliction of emotional distress to the Court of Appeals, which itself agreed that the trial court improperly dismissed his claim as barred by the statute of limitations. Mr. Todd is arguing to this Court that the reasoning that the Court of Appeals used to refuse to permit his claim to continue was erroneous and not supported by Michigan's case law. It's late for MSNBC to now claim that the entire case is somehow waived without any application of the law it cited. But it's hard to tell, since MSNBC didn't *apply* the law it cited to the facts in this case. MSNBC appears to want this Court to do its legal research and reasoning for it.

“The fact that plaintiffs may not have fully briefed and argued this issue in their lower court pleadings, or that they now cite authority that the circuit court did not consider, does not preclude them from raising the issue on appeal.” *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). MSNBC conflates the preservation of an *issue* for appellate review and the *rationale* argued to support the party's position. That the Court of Appeals addressed the properly preserved issue of the dismissal of Mr. Todd's claim for intentional infliction of emotional distress doesn't negate the fact that the court below did so by erroneously applying Michigan law. If we were to apply MSNBC's position on issue preservation to its own arguments, it would be precluded from arguing against Mr. Todd's claims for false light invasion of privacy and appropriation since the circuit court did not make any ruling on those issues, other than to ignore Mr. Todd's motion to amend his complaint. “Generally, to preserve an issue for appellate review, the issue must be raised before **and decided by the trial court.**” *Detroit Leasing Co v City of Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005) (emphasis added).

We are left with a situation where MSNBC has presented no argument against Mr. Todd's position that the Court of Appeals did not properly apply the *context* and *relative position* elemental requirements of intentional infliction of emotional distress.²

B. MSNBC's First Amendment claim ignores the fact that its publication was completely false and not a matter of public interest

The common thread through the reminder of MSNBC's argument is that the television show at issue was a "matter of public concern," but once again it does not explain, in any way, *how* a completely false report is somehow a newsworthy event worthy of First Amendment protection. If we were to follow the logic of MSNBC's argument, we would have to conclude that any television show it airs, even if defamatory, would be protected by the First Amendment if they waived their hand and declared that it was somehow a newsworthy event. In other words, there might as well not be any torts related to defamation, intentional infliction of emotional distress, false light invasion of privacy, or any privacy-related torts at all, as long as the publisher declares that the content is somehow a news broadcast. Of course this is absurd, but MSNBC does not at all address *how* it comes to the conclusion that its television show—a broadcast of completely false information about someone who had *nothing* to do with the events being depicted—is newsworthy.

C. The Michigan Court Rules plainly permit Mr. Todd to amend his complaint—including after summary disposition

MSNBC then argues, contrary to the plain language of MCR 2.116(I)(5), that somehow the court clerk's "closed" file overrides the court rules. Mr. Todd addressed this argument in his application to his Court, and further argued it in his briefs in the court below. Suffice it to say that, without repeating the previous argument already made to this Court, because his case was

² See also MCR 7.305(B)(5)(b).

dismissed through an error of law by the trial court under MCR 2.116(C)(7), and that the Court of Appeals agreed that the trial court improperly did so, the mandatory language of MCR 2.116(I)(5) applies, and he should have been permitted to amend his complaint, particularly when the court rule specifically contemplates amending the complaint after summary disposition. The language of the rule is mandatory, using the term “shall.” MSNBC uses circular logic to come to a conclusion that is directly contradicted by the plain language of the court rule. If, as the Court of Appeals concluded, the trial court would have properly dismissed Mr. Todd’s case under MCR 2.116(C)(8), the mandatory language of MCR 2.116(I)(5) applies.

D. MSNBC applies an “actual malice” standard that is reserved for public figures to Mr. Todd, a private-figure plaintiff

MSNBC, perhaps in a desperate bid to stave off a claim for false light invasion of privacy, argues that an “actual malice” standard applies to said tort. However, as the Court of Appeals in its most recent published opinion regarding this tort stated “[t]hus, this cause of action is similar to a defamation claim and, as with such a claim, the First Amendment requires that **public-figure plaintiffs** must prove actual malice with clear and convincing evidence.” *Battaglieri v Mackinac Ctr for Pub Policy*, 261 Mich App 296, 304; 680 NW2d 915 (2004) (emphasis added). Therefore, the actual malice standard only applies to public figure plaintiffs. The court in *Battaglieri*, as the source of the actual malice standard it applied in that case, cited *Ireland v Edwards*, 230 Mich App 607; 584 NW2d 632 (1998). Once again, in *Ireland*, the plaintiff was deemed to be a (limited) public-figure plaintiff, thus necessitating the actual malice standard required by the First Amendment. See *Ireland, supra* at 615, 622. The *Ireland* court cited, as justification for its position, *New Franklin Enters v Sabo*, 192 Mich App 219; 480 NW2d 326 (1991), where that court stated “[p]ublishers of statements concerning public figures

are clothed with a qualified immunity that can be overcome only by a showing of actual malice. A private person can become a limited-purpose public figure when he voluntarily injects himself or is drawn into a particular controversy and assumes a special prominence in the resolution of that public controversy.” *Id.* at 222 (internal citation omitted). If the actual malice standard applies to all plaintiffs in a false light invasion of privacy claim, these courts would not have needed to make any such distinction between plaintiff types. Nowhere has MSNBC claimed that Mr. Todd is a public figure or a limited-purpose public figure.

MSNBC’s own citation to *Battaglieri* is, once again, apparently done with the hope that this Court doesn’t actually read the cases cited in its brief. MSNBC’s case against the tort of false light invasion of privacy is so weak that its argument in the court below was essentially that false light invasion of privacy just shouldn’t be a tort at all. But it is, and Mr. Todd has made a *prima facie* case that he has a legitimate claim.

Furthermore, *Battaglieri* additionally supports Mr. Todd’s claim for appropriation. Mr. Todd apologizes for the lengthy quotation, but the issue is addressed plainly:

The invasion of privacy cause of action for appropriation is founded upon “the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others.” 3 Restatement, Torts, 2d, § 652C, comment a. The right protected by the tort “is in the nature of a property right,” *id.*, which the tort recognizes as being violated whenever “the defendant makes use of the plaintiff’s name or likeness for his own purposes and benefit” *Id.*, comment b. Thus, in contrast to the other forms of invasion of privacy, there need be no allegation that a statement about a plaintiff was an intrusion upon seclusion or private matters or that it was in any way false. Instead, **any unauthorized use of a plaintiff’s name or likeness, however inoffensive in itself, is actionable if that use results in a benefit to another.**

Perhaps because this theory of liability is so far-reaching, courts that have recognized the appropriation tort have also uniformly held that the First Amendment bars appropriation liability for the use of a name or likeness in a publication that concerns matters that are newsworthy or of legitimate public concern. . . . “If a communication is about a matter of public interest and there is a real relationship between the plaintiff and the subject matter of the publication,

the matter is privileged.” . . . The privilege exists because dissemination of information regarding matters of public concern is necessary for the maintenance of an informed public.

Whether the privilege applies depends on the character of the publication. A defendant can be “liable for the tort of misappropriation of likeness only if defendant's use of plaintiff's likeness was for a predominantly commercial purpose The use must be mainly for purposes of trade, without a redeeming public interest, news, or historical value.” The question whether a publication is sufficiently a matter of public interest to be protected by the privilege is ordinarily decided by the court as a question of law. [*Id.* at 301-02 (emphasis added and internal citation omitted).]

We see why MSNBC is clinging to the claim that somehow its completely false depiction of Mr. Todd is a newsworthy event. Appropriation is a tort that compensates a plaintiff for the use of his likeness in a commercial context, but a defendant is privileged if that likeness is used as part of the depiction of a newsworthy event. Mr. Todd fails to see (and MSNBC fails to explain) how a television show that purports to be news, yet utilizes completely false information, is a protected publication that has “public interest, news, or historical value.” It doesn’t.

Mr. Todd further notes that MSNBC’s use of *Battaglieri* provides an additional reason why this Court should review his case. While Michigan’s Courts of Appeals have decided that false light invasion of privacy involves First Amendment considerations when being applied to public figure plaintiffs, and that appropriation does apply even to private parties, this Court has not.³ While Mr. Todd believes that this Court, in the interest of judicial restraint, need only address the issues that he should have been able to proceed on his intentional infliction of emotional distress claim and amend his complaint to add two additional torts for which he has made a *prima facie* claim, this Court could take this opportunity to clarify the additional torts Mr. Todd wishes to bring in his amended complaint.

³ See MCR 7.305(B)(3).

E. Conclusion

MSNBC clings to the new claim that its broadcast of Mr. Todd's likeness, name, age, and driver's license photo was a mere "mistake." Yet this new contention is not supported in any way by anything on the record and MSNBC cites no part of the record to support its position. MSNBC not only broadcast the wrong name, it actively sought out the personal details of Mr. Todd, including obtaining his driver's license photo. MSNBC *had* the correct details on the actual suspect, apparently including his criminal record. The fact that MSNBC retracted and apologized after this was brought to its attention affirmatively shows that it internally knew of the profound error and acted in disregard of the truth.

Mr. Todd recognizes that this Court's bar is high for a grant of application for leave to appeal, but, as he argued in his application, his case is an example of manifest injustice if he is not allowed to proceed and a situation where a Court of Appeals panel improperly applied Michigan law.⁴

Mr. Todd does ask that the members of this Court review one bit of evidence which unequivocally shows that MSNBC *knew* that it should not have wantonly accused third parties of criminal acts in its television show. The record contains a DVD copy of the episode in question. Mr. Todd urges the members of the Court to review this video and carefully notice that, at approximately seven minutes and eight seconds into the episode, other individuals who *were* actually involved in the incident begin to exit the limousine. Their faces are blurred so that they cannot be recognized. MSNBC *knows* it shouldn't be accusing people wantonly of crimes, nor using other people's likenesses to make money without their permission. MSNBC afforded those who actually *were* a part of the incident far more protection than it afforded Mr. Todd, an innocent party with no connection to MSNBC's program.

⁴ See MCR 7.305(B)(5)(a).

MSNBC has the power to alter people's lives with its vast media apparatus and broadcasting power. Mr. Todd is a young man whose life was disrupted by an entity he is powerless against.

Mr. Todd asks that this Court allow him a chance to pursue justice. He asks that this Court grant his application and reverse the lower court or peremptorily reverse the lower court and allow his case to proceed.

Respectfully submitted,

Dated: 3/8/2016

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